Case No. 85860-8

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOSE R. VELIZ, JR.,
Petitioner.

BRIEF OF AMICI CURIAE LEGAL VOICE, THE WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE, AND THE NORTHWEST JUSTICE PROJECT

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I. INTRODUCTION

Every parent's worst nightmare is to have her child abducted. For a domestic violence victim, abduction of her child by an abusive intimate partner is especially terrifying; she knows all too well what the abuser is capable of doing, and she knows that the abuser will use her children to terrorize and control her. This case has critical implications for the ability of domestic violence survivors to protect themselves and their children. The issue presented is whether domestic violence protection orders entered pursuant to RCW 26.50.060 may be "court-ordered parenting plans" for purposes of RCW 9A.40.060(2), a provision of Washington's custodial interference statute. *Amici* urge the Court to find that when RCW 26.50.060 orders contain residential provisions for minor children, they are "parenting plans" under RCW 9A.40.060(2).

To hold otherwise will undermine the effectiveness of domestic violence protection orders in protecting victims and their children and in holding abusers accountable. It would also be contrary to rules of statutory construction and public policy. The

Court should affirm the Court of Appeals and rule that violation of a domestic violence protection order's residential provisions for children may constitute custodial interference under the criminal code.

II. IDENTITY AND INTERESTS OF *AMICI*

Amici's identities and interests are set forth in detail in the Motion for Leave to File *Amici Curiae* Brief, filed herewith.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in the Brief of Respondent to the Court of Appeals, Division III.

IV. ARGUMENT

Washington's custodial interference statute is clearly intended to prevent child abductions like the one Jose Veliz committed. Washington also has enacted strong protections for victims of domestic violence like Mr. Veliz's former spouse Lorena Velasco – including the ability to protect herself and her children by obtaining a domestic violence protection order with enforceable parenting provisions for her children. Under basic rules of statutory

construction, and to uphold Washington's strong public policy against domestic violence, the decision of the Court of Appeals in this case must be affirmed.

A. Domestic Violence Protection Orders Containing Residential Provisions for Minor Children are Court-Ordered Parenting Plans for Purposes of Custodial Interference Charges Under the Plain Language of RCW 9A.40.060(2) and Related Canons of Construction.

Statutory interpretation effectuates legislative intent. *State v. Donaghe*, 172 Wn.2d 253, 262-63, 256 P.3d 1171 (2011). "If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). An undefined term will "be given its plain and ordinary meaning unless a contrary legislative intent is indicated." *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998). Plain meaning is determined by "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Donaghe*, 172 Wn.2d at 262-63 (quoting *Campbell & Gwinn,* 146 Wn.2d at 9).

RCW 9A.40.060(2) allows for felony charges of custodial interference where one parent "conceals the child ... from the other parent having the lawful right to time with the child pursuant to a court-ordered parenting plan." The statute does not define the phrase "court-ordered parenting plan." Where a term is undefined, it should be given its ordinary and usual meaning. *Ravenscroft*, 136 Wn.2d at 921; *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). The ordinary and usual meaning of the words demonstrates that a "court-ordered parenting plan" is a court-issued order that includes visitation, residential, or custody provisions for a parent and a child. *See* MERRIAM-WEBSTER, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED, (12 Jan. 2012), http://unabridged.merriam-webster.com (defining "court order" as "an order issuing from a competent court requiring a person to do or abstain from doing a certain act," "parenting" as "to be or act as the parent of," and "plan" as "a method of achieving something").

The plain meaning of "parenting plan" is also demonstrated by the parenting plan definitions in the dissolution provisions of

RCW 26.09. *Donaghe*, 172 Wn.2d at 262-63 (court may look to "related provisions" for plain meaning). As the Court of Appeals explained, the only common portion of the definition of the terms "temporary parenting plan" and "permanent parenting plan" found in the dissolution statutes is a "plan for parenting a child." *State v. Veliz*, 160 Wn. App. 396, 405-06, 247 P.3d 833 (2011); RCW 26.09.004(3)-(4). Under these statutory definitions, a "parenting plan" is simply "a plan to parent a child" – in whatever form.

This is further reinforced by RCW 26.50 itself. RCW 26.50.060(1)(d) *requires* courts issuing domestic violence protection orders to make residential provisions for children of the parties on the same basis as provided in RCW 26.09. While RCW 26.50.060(1)(d) also states that when making residential provisions in a domestic violence protection order, "parenting plans *as specified in chapter 26.09 RCW* [the dissolution statute] shall be not required...", this language does not mean that residential provisions in a domestic violence protection order do not constitute a

"court-ordered parenting plan." To the contrary, the fact that the Legislature referred to "parenting plans *as specified in chapter 26.09*"demonstrates its recognition that there are parenting plans *other* than those in RCW 26.09 – such as those contained in the residential provisions of protection orders. Otherwise, the phrase "as specified in chapter 26.09" would be superfluous. The Court must presume the Legislature did not intend to include superfluous language in a statute. *See, e.g., State v. Lundquist*, 60 Wn.2d 397, 403, 374 P.2d 246 (1962) ("A legislative body is presumed not to have used superfluous words. Courts are bound to accord meaning, if possible, to every word in an ordinance or statute.").

On its face, the domestic violence protection order in this case contained a plan for parenting the parties' child. It established that their daughter ("N.V.") would live most of the time with Ms. Velasco, with Mr. Veliz having limited visitation time. *See* RP 88 (Veliz describing this provision as "my court-ordered visitation"). It is thus a "court-ordered parenting plan" for purposes of RCW 9A.40.060(2). Mr. Veliz can hardly deny that the order

established a plan for parenting N.V., as he abided by its terms from May 5, 2008 until he abducted his daughter in August 2008. (RP 87-88).

Implicitly acknowledging this fact, Mr. Veliz argues that since the protection order did not contain other provisions commonly found in temporary and permanent parenting plans, it is not a true parenting plan. Petition for Review at 13-14; *see also* RCW 26.09.194 (temporary parenting plans may contain court-ordered support); RCW 26.09.184 (permanent parenting plans shall contain dispute resolution process, decision-making authority, and residential provisions). But this reading ignores the entire purpose of the custodial interference statute. *Donaghe*, 172 Wn.2d at 262-63 (courts look to " statutory scheme as a whole" for plain meaning).

The essence of custodial interference is that one parent unlawfully deprives the other parent of "time with the child." RCW 9A.40.060(2) (violation occurs where one parent "conceals the child ... from the other parent having the lawful right to time with the child pursuant to a court-ordered parenting plan"). Violations of

other terms of a parenting plan are irrelevant to the prohibited conduct. *See id.* Mr. Veliz's position would only attach felony penalties under RCW 9A.40.060(2) to violations of court orders with all the standard (but irrelevant) provisions of a temporary or permanent parenting plan issued pursuant to RCW 26.09. This overly technical definition of "parenting plan" is not required by the criminal statute, nor does it further its purposes.[1] *See State v. Rinkes*, 49 Wn.2d 664, 667, 306 P.2d 205 (1957) ("a court may not place a narrow, literal, and technical construction upon a part only of a [penal] statute, and ignore other relevant parts," rather, "statutes are to be construed according to their evident intent and purpose.").[2]

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[1] To the contrary, if the residential provisions in a domestic violence protective order cannot be the basis for custodial interference charges, this creates a perverse incentive for abusers to abduct children before a court can enter a RCW 26.09 parenting plan – which is exactly what happened in this case.

[2] Contrary to Mr. Veliz's suggestion, "the rule of lenity does not require [a court] to reject an 'available and sensible' interpretation in favor of a 'fanciful or perverse' one...." *State v. McGee*, 122 Wn.2d 783, 789, 864 P.2d 912 (1993) (quoting *Commonwealth v. Tata*, 28 Mass.App.Ct. 23, 24-25, 545 N.E.2d 1179 (1989), *review denied*, 406 Mass. 1103, 548 N.E.2d 887 (1990)). The rule of lenity only applies when the purportedly ambiguous term "is subject to two or more **reasonable** interpretations." *Id.* at 787 (emphasis added). Mr. Veliz's offered construction of "parenting

Since the protection order below was a court-issued order that contained a plan to parent a child, it satisfies the plain meaning of the term "court-ordered parenting plan" in RCW 9A.40.060(2). Mr. Veliz's violation of that order was appropriate grounds for his first-degree custodial interference charges.

B. The Legislative History of the Custodial Interference Statute Demonstrates that the Legislature Intended to Prohibit the Exact Conduct of Which Mr. Veliz is Guilty.

Amici are confident that the Court need not look further than the plain language of the relevant statutes and common statutory interpretation rules in order to decide this case. In the event, however, that the Court finds the term "court-ordered parenting plan" to be ambiguous, the legislative history and purpose of the custodial interference statute shows that a domestic violence protection order may be a court-ordered parenting plan for purposes of RCW 9A.40.060(2). *See Donaghe*, 172 Wn.2d at 262 (if undefined

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plan" requires incorporation of irrelevant parts of the dissolution statutes into the criminal code. Such an interpretation is unreasonable and the rule of lenity does not apply. This Court has also cautioned against "inflexible application of this rule" when it would "undermine the intent of the Legislature" and "unnecessarily interfere" with the objectives of a criminal statute. *State v. Riles*, 135 Wn.2d 326, 341, 957 P.2d 655 (1998).

term is ambiguous, court may turn to "statutory construction, legislative history, and relevant case law").

The legislative history of the custodial interference statute demonstrates the Legislature's deep concern with the conduct at issue in this case. The Legislature enacted HB 2333 in 1994 to modify the language of RCW 9A.40.060(2) and (3)to include reference to a court-ordered parenting plan and provide that violation of such a plan is a felony. CERTIFICATION OF ENROLLMENT, HOUSE BILL 2333, 53d Leg., Reg. Sess. (Wash. 1994). The purpose of this bill was to ensure that "a parent [who] deliberately conceals a child from the other parent and moves out of the state with the intention of hiding the child from the parent" will be charged with a felony. HOUSE BILL REP. on HB 2333, 53d Leg., Reg. Sess. (Wash. 1994).

The Legislature's intent in adding the "court-ordered parenting plan" language to RCW 9A.40.060(2) was to prevent the exact conduct engaged in by Mr. Veliz. In fact, the driving force behind enactment of HB 2333 was to ensure that kidnapping parents were charged with felonies instead of misdemeanors since only a

felony warrant would be enforced out-of-state: "if a parent removes the child from the state with the intent to go underground, capturing the parent and returning the child may be very difficult, because law enforcement agencies in other states do not act on misdemeanor warrants from other states."[3] FINAL BILL REP. on HB 2333, 53d Leg., Reg. Sess. (Wash. 1994).[4]

The final bill report for this legislation states that the addition of the "court-ordered parenting plan" language to RCW 9A.040.060(2) was triggered by changes made to RCW 26.09,

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[3]The Legislature's concern was borne out in this case: it is likely that Mr. Veliz would not have been arrested by California law enforcement but for the felony custodial interference charges pending against him in Washington, and he may have never resurfaced with his daughter. Indeed, there is some suggestion in the record that Mr. Veliz only brought his daughter back to this country because of his discovery of the pending felony charges. *See, e.g.*, RP 90, 94.

[4] HB 2333 also added specific language to the warning provision in RCW 26.09.165 that violations of a parenting plan may constitute custodial interference. The Legislature clearly anticipated, however, that court orders without that specific warning could still be the basis for a prosecution under RCW 9A.40.060(2). HOUSE BILL REP. on HB 2333, 53d Leg., Reg. Sess. (Wash. 1994) ("[T]he law should only apply prospectively to those court orders which contain an express warning about the consequences of moving out of state. *Other exceptions should also apply.*") (emphasis added). Thus, even if the Court finds RCW 26.09.165 generally applicable, it should find that the protection order provisions of RCW 26.50 are one such legislatively-anticipated exception to its terms.

Washington's dissolution statute, and the change is intended to reflect updated terminology used in the domestic relations statutes. FINAL BILL REP. on HB 2333, 53d Leg., Reg. Sess. (Wash. 1994). Mr. Veliz contends that because of this, RCW 9A.040.060(2) must be interpreted to incorporate all the provisions of RCW 26.09. Petition for Review at 14-15. However, to interpret the statute as Mr. Veliz suggests would be contrary to the rights of the two victims of custodial interference – N.V., the abducted child, and Ms. Velasco, the parent from whom the child was taken – rights that the statute was expressly designed to protect.

Washington courts construe criminal statutes to further the following four purposes: 1) to prevent conduct that inflicts or threatens substantial harm to individual or public interests, 2) to safeguard noncriminal conduct, 3) to give fair warning of the criminal nature of the conduct, 4) to differentiate between serious and minor offenses and mete out proportionate penalties. RCW 9A.04.020(1)-(2). Likewise, while "penal statutes are to be construed strictly," *Rinkes*, 49 Wn. 2d at 667, the "spirit or intention

of the law must prevail" where "the obvious objectives or policy behind" the legislation are clear. *State v. Brasel*, 28 Wn. App. 303, 309, 623 P.2d 696 (1981).

The kidnapping and concealment of a child in violation of a court order is undisputedly conduct that threatens substantial harm to individuals and to the public interest. There is no danger that enforcing the order with criminal penalties will inhibit legitimate, noncriminal conduct – removing a child from the country and concealing her location from another parent for months in violation of a domestic violence protection order is behavior that the state should prohibit in the strongest possible terms.

Likewise, there is no dispute that Mr. Veliz had actual notice of the order and its provisions, and fair warning that violating its terms would carry criminal sanction.[5] Mr. Veliz had to know that violating a court order could carry criminal penalties[6] – whether he thought such penalties would be misdemeanor or felony weight

[5] *See* CP 35-38 (order with warnings).

[6] Mr. Veliz is a trained paralegal. RP 92.

charges should be irrelevant. *See* RCW 26.50.110 (setting out escalating criminal penalties for violation of protective order).

There is no legitimate basis to distinguish between identical conduct that violates a domestic violence protection order under RCW 26.50 rather than a parenting plan entered under RCW 26.09. To the contrary, the state and the public's interests in treating similar serious offenses similarly and in meting out proportionate penalties were furthered by the ruling below. In contrast, Mr. Veliz asks the Court to treat his willful four-month abduction of N.V. as equivalent to interfering with a victim's efforts to remove a *pet* from the home under the terms of an order of protection. *See* RCW 26.50.110(1)(a). This Court should reject such arguments.

C. The Public Policies Behind the Domestic Violence Prevention Act Strongly Support Enforcement of Orders of Protection Through Custodial Interference Charges Where Appropriate.

1. The Legislature enacted RCW 26.50 to address the growing epidemic of family violence.

In 1984, the Washington State Legislature enacted RCW 26.50, the DVPA, in response to the epidemic problem of

domestic violence and the grave social and economic consequences it poses. RCW 10.99.010. Recent statistics bear out these legislative concerns, to an alarming degree. For example, in 2010, the CDC's Division of Violence Prevention reported the following data:

- More than 1 in 3 women (35.6%) and more than 1 in 4 men (28.5%) in the United States have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime;
- About 1 in 4 women (24.3%) and 1 in 7 men (13.8%) have experienced severe physical violence by an intimate partner at some point in their lifetime;
- Nearly half of all women and men in the United States have experienced psychological aggression by an intimate partner in their lifetime (48.4% and 48.8% , respectively).

Michele C. Black, Kathleen C. Basile, *et al.*, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, Centers for Disease Control and Prevention (November 2011), pp.1-2.[7]

In 2010, Washington law enforcement agencies received reports of 49,233 domestic violence offenses, including simple assault and violation of protection/no contact orders. This was an increase of 2.17% over 2009. *2010 Crime in Washington Annual*

[7] Available at www.cdc.gov/ViolencePrevention/pdf/NISVS_Executive_Summary-a.pdf

Report, Washington Association of Sheriffs and Police Chiefs, available at http://www.waspc.org/index.php?c=Crime%20Statistics.

As grim as these statistics are, they are only the tip of the iceberg. Domestic violence involves more than physical violence, sexual assault, and stalking of one intimate partner by another. Domestic violence perpetrators use a wide array of tactics to control and terrorize their victims – and child abduction is one of the most effective ways to accomplish that goal. "Even after separation, batterers use the children as pawns to control the abused party." Washington State Gender & Justice Comm'n, *Domestic Violence Manual for Judges* at 2-36 (2006). This tactic includes "[h]olding children hostage or abducting the children in efforts to punish the abused party or to gain the abused party's compliance." *Id.* at 2-37.

As a result, it is essential that domestic violence victims have strong enforcement tools to ensure that their children will not be abducted by their abusers – and to ensure that abusers will be held accountable. Otherwise, the purposes of the DVPA will be thwarted.

2. The Washington State civil protection order enables victims to protect their families, and will be undermined if not enforced through custodial interference charges.

With the DVPA, the Legislature created the civil protection order, a means for victims to obtain, without the assistance of a lawyer, a court order preventing contact between the abuser and the victim and, where appropriate, the victim's children. The number of people seeking protection orders is one measure of its accessibility: in 2010, individuals filed 17,133 domestic violence petitions in Superior Court and 2,244 petitions in District or Municipal Court.[8]

As a practical matter, the domestic violence protection order process may be the only accessible means for victims to address the safety of their children. The 2003 Washington State Civil Legal Needs Survey indicated that low income citizens in Washington face more than 85% of their legal problems without an attorney (60% in

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[8] For Superior Court statistics, *see* http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=civil&fileID=civfilyr.

For statistics for courts of limited jurisdiction, *see* http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=a&tab=&fileID=rpt10.

family law matters). *Washington State Legal Needs Study*, 8 (2003). The protection order is meant to be available to pro se litigants, who have considerable barriers to representing themselves in dissolution proceedings or other family law actions.

While there is no reported data on the number of domestic violence protection orders that include residential provisions for minor children, these provisions are a vital part of addressing domestic violence: "Protection order statues generally permit courts to include custody and visitation provisions ... there is a strong link between victim safety and court orders regarding the placement of children." Deborah M. Goelman, *Shelter From the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 Colum. J. Gender & L. 101, 104 (2004).

Accordingly, the DVPA provides that courts issuing domestic violence protection orders must make residential provisions for children of the parties. *See* RCW 26.50.060(1)(d). The purpose of this provision is clear: Victims must be able to ensure that they will

not lose their children when they escape abusive relationships. For a parent, a protection order's residential provisions for a minor child may be essential:

> Protection orders are a critical point of intervention for many individuals ... it is important to recognize that a survivor's ability to exit a relationship may be limited by the need to care for her children.

Jane K. Stoever, *Freedom From Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 Ohio St. L.J. 303, 320 (2011).

To be effective, residential provisions in domestic violence protection orders must be enforceable. In many cases, disputes over children remain a catalyst for continued intimidation and abuse even if a protection order is obtained. Sean D. Thueson, *Civil Domestic Violence Protection Orders In Wyoming: Do They Protect Victims Of Domestic Violence?*, 4 WYO. L. Rev. 271, 279-91 (2004) (discussing study by The National Council of Juvenile and Family Court Judges). "Batterers deliberately use the children as weapons after separation to punish victims for leaving or to force them to reconcile." Goelman, *supra,* at 109. In the absence of enforcement

of residential provisions with the felony charges in the custodial interference statute, abusers have no real incentive not to use children to further victimize their former partners.[9]

V. CONCLUSION

For all of these reasons, *Amici* urge the Court to affirm.

Respectfully submitted this 13th day of January, 2012.

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[9] There is no empirical evidence that victims misuse the protection order process to gain tactical advantage in custody matters. *See, e.g.*, Goelman, *supra*, at 114 (referencing the "misguided notion ... that petitioners are attempting to circumvent the rules governing domestic relations cases."). In any case, orders of protection are subject to modification by the court presiding over a dissolution matter, and all Washington trial courts have ample authority to appropriately address any isolated instance of abuse. *See* RCW 26.50.025; CRLJ 11; CR 11.